

Biewer Wisconsin Sawmill, Inc. and Midwestern Industrial Council-United Brotherhood of Carpenters and Joiners of America, AFL-CIO.
Case 18-CA-11936

September 29, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On September 16, 1992, Administrative Law Judge Clifford H. Anderson issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order.

The complaint alleges that on August 16, 1991, the Respondent violated Section 8(a)(3) and (1) of the Act by admittedly discharging Leonard Kaser because he engaged in union activities. The judge found that the Respondent committed no violation because Kaser was a supervisor within the meaning of Section 2(11) of the Act, and consequently unprotected by the Act. The General Counsel excepts to the judge's finding that Kaser was a supervisor. We reject the General Counsel's exception because we agree with the judge that Kaser possessed the authority to discipline employees.

Factual History

The Respondent operates a sawmill in Prentice, Wisconsin. The sawmill contains several boilers, integral to the operation of the enterprise and located in a facility set apart from the rest of the plant. Tim Biewer is the senior management official at the plant.

On February 26, 1990, 3 months before either the boilers or the plant commenced operation, Biewer hired Leonard Kaser to work in the boiler room.¹ Unlike the inexperienced individuals who were subsequently to be hired as boiler operators, Kaser was a licensed operator with 14 years of experience. Because of his experience and with the express authorization of Biewer, Kaser played a large role in training the new boiler employees. And though much of the employees' work was routine, Kaser continued to monitor their activities and progress, to recommend ways for them to become more familiar with the machinery, to direct their performance of maintenance and safety procedures, and to hold occasional troubleshooting meetings.

On November 11, 1990, boiler operator Glenn Polacek allowed the pressure in one of the boilers to go down to zero for the third time in 5 months. After

the second time Polacek "dropped" the boiler, Kaser had gone to Biewer and recommended that Polacek be fired. Biewer told him that an employee had to be "written up" before he was discharged. Kaser had also discussed the matter with Russell Williamson, supervisor of the plant's maintenance department, who informed Kaser that if such an incident happened again, Kaser could write up Polacek.²

On learning of Polacek's November 11 mishap, Kaser again took the matter to Williamson, who directed Kaser to write up Polacek.³ Kaser followed Williamson's instructions, and signed Polacek's write-up in the space left for the issuing "supervisor." Kaser presented a copy of the writeup to Polacek in a meeting on November 13 between himself, Polacek, and Biewer.

According to Biewer, Kaser told Polacek at that meeting that if the boiler lost pressure again while under Polacek's control, it would be "the end of his job." Polacek testified that Kaser told him, "if I couldn't do the job, he'd find someone that would." The judge did not specifically credit either version of the testimony, but found that Kaser's statement, whatever its precise phrasing, carried with it the threat that another mistake of this kind would cost Polacek his job.

Biewer apparently said nothing at the November 13 meeting. Both Polacek and Biewer testified that Kaser did the talking at that meeting. Kaser testified that Biewer also spoke, but could not remember anything that was said. The judge generally credited Polacek over Kaser.

Polacek was never fired, but subsequently quit of his own volition.

Analysis

Section 2(11) of the Act sets forth the 13 indicia of supervisory status. It is well established that the possession of any one of those indicia is sufficient to confer supervisory status, provided that authority is exercised with independent judgment on behalf of management and not in a routine manner. *Phelps Community Medical Center*, 295 NLRB 486, 489 (1989); *Bowne of Houston*, 280 NLRB 1222, 1223 (1986). Hence, the exercise of some purportedly "supervisory authority" in a merely routine, clerical, perfunctory, or sporadic manner does not confer supervisory status. Id.

²It is uncontested that Williamson was a supervisor within the meaning of Sec. 2(11). The size of the "maintenance department" that Williamson supervised, however, is a subject of disagreement between the parties. The General Counsel contends as one of his theories that the boiler room was part of the larger maintenance department supervised by Williamson. The Respondent contends that maintenance operations and the boiler room constituted two separate departments, supervised by Williamson and Kaser, respectively.

³The judge inadvertently stated that it was Biewer who told Kaser to write up Polacek after the November 11 incident.

¹The judge inadvertently stated that Kaser was hired in 1991. We correct the error.

As the Board and the Seventh Circuit have noted, the Board owes a duty to employees not to construe supervisory status too broadly, for if the individual is deemed a supervisor, he loses the Section 7 rights Congress intended to be protected by the Act.⁴ *Phelps Community Medical Center*, 295 NLRB at 492; *Westinghouse Electric v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970). For that reason, the party contending that a person is a supervisor carries the burden of persuasion on that issue. *Adco Electric*, 307 NLRB 1113 fn. 3 (1992).

We agree with the judge's finding that the Respondent has met its burden, because we agree with him that Kaser possessed "the authority . . . to discipline other employees" as set forth in Section 2(11). We do so, however, only on the basis of the following analysis.

The judge found that Kaser was not only clearly expected to but did issue writeups to other boiler operators when appropriate, and that his writeup of Polacek constituted "strong . . . evidence of Kaser's authority to discipline employees" We do not rely on these findings for two reasons. First, the only time Kaser wrote up an employee, Polacek, was pursuant to Williamson's specific instruction; consequently, there is no support in the record—not even a single episode—for finding that Kaser used the independent judgment required by Section 2(11) to issue writeups. Second, to establish that Kaser's authorization to write up other employees gave him the statutory authority to discipline, the Respondent would have to show that the writeups themselves affected the employees' tenure or job status. *Passavant Health Center*, 284 NLRB 887, 889 (1987); *Phelps Community Medical Center*, 295 NLRB at 490, 491. Here, the only individual Kaser ever wrote up was Polacek, and that writeup neither indicated that Polacek's job status had been affected nor was itself relied on in imposing discipline. Thus even if we were to find that Kaser exercised independent judgment in deciding to write up other employees, no supervisory status would be established, because no facts support a finding that disciplinary decisions were made based on Kaser's writeups.⁵ *Phelps Community Medical Center*, supra at 491.

Although Kaser's writeup of Polacek does not establish Kaser's disciplinary authority, his words and actions at the meeting between himself, Polacek, and Biewer on November 13 do. As the judge found, Kaser warned Polacek at that meeting that if the boiler lost pressure again, it would cost Polacek his job. It is this warning that leads us to find that Kaser had the author-

ity to discipline within the meaning of Section 2(11). Authoritatively placing an employee one step away from termination is discipline of the most basic sort, almost tautologically affecting job status. Here, Biewer's presence at the meeting—as well as his tacit approval by silence—strongly suggest that Kaser's words were not frivolous; that he had the power to mete out the punishment to which his words gave shape. And even though Williamson originally told Kaser to write up Polacek, Kaser's act of admonishing Polacek as to what the discipline would be in the event of a recurrence, and his determination of the nature of that discipline, were products of no one's independent judgment but Kaser's.⁶ There was nothing routine, perfunctory, or clerical about it; and although it was the only time that Kaser exercised such authority, we do not view it as sporadic.⁷

Having found that Kaser had the authority to discipline other employees, we need not decide whether Kaser "responsibly directed" the other boiler employees within the meaning of Section 2(11). His disciplinary authority is sufficient to make him a supervisor, and to exempt him from the protections of the Act.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

⁶ After the second incident, Biewer told Kaser that a writeup was a condition precedent to a discharge. This is not the same thing as saying that misconduct following a writeup *must* result in discharge. After the third incident, Williamson told Kaser to write up the employee. However, it was Kaser who decided, on his own, that subsequent misconduct would result in discharge.

⁷ The need to impose such a serious penalty is not one that customarily arises on a daily basis, particularly in a "department"—like Kaser's—containing only three other employees. These details, as well as the fact that Kaser had only worked at the sawmill for a year and a half, make it unsurprising that Kaser exercised this authority only once.

Moreover, Kaser's prior conversations with both Williamson and Biewer as to how he might penalize Polacek for future delinquencies belie any assertion that Kaser's disciplining of Polacek was outside the normal scope of his authority.

Marlin O. Osthus and Susan E. Moore, Esqs., for the General Counsel.

Richard J. Seeryak, Esq. (Miller, Canfield, Paddock and Stone), of Detroit, Michigan, and Douglas S. Touma, Esq. (Touma, Watson, Coury & Castello), of Port Huron, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this case in trial on May 28, 1992, in Phillips, Wisconsin. Posthearing briefs were due on July 2, 1992. Subsequent briefs were received on July 23 and August 3, 1992. The case arose as follows:

⁴ This duty becomes readily apparent where, as here, an individual is fired for engaging in union activities.

⁵ We similarly reject the judge's finding that Kaser had the power effectively to recommend discipline. The only recommendation Kaser made as regards Polacek was discharge, and that recommendation was ineffective. There is not a single instance in the record of Kaser recommending discipline, much less doing so effectively.

On October 15, 1991, the Midwestern Industrial Council—United Brotherhood of Carpenters and Joiners of America, AFL-CIO (the Union) filed a charge with Region 18 of the National Labor Relations Board, docketed as Case 18-CA-11936, against Biewer Wisconsin Sawmill, Inc. (Respondent) and amended that charge on February 10, 1992. Following an investigation the Regional Director of Region 18 on February 11, 1992, issued an order consolidating cases, consolidated complaint, and notice of hearing consolidating certain allegations arising under the instant charge with other allegations arising under other charges against Respondent. Thereafter further consolidation and complaint amendment orders were issued by the Regional Director. Immediately preceding the trial the parties resolved all matters not contained in the charge herein and the February 11, 1992 consolidated complaint. Further during this time the parties narrowed the allegations under the charge and complaint.

The complaint during the process described above was winnowed to a single allegation of wrongdoing, i.e., that on or about August 16, 1991, Respondent discharged its employee Leonard (Lenny) Kaser because of his union activities and to discourage employees from engaging in union activities. This conduct is alleged to violate Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).

Respondent, in its answer and in stipulations at trial, admits that it discharged Kaser because of his union activities. It further avers, however, that its conduct was permissible under the Act because at all relevant times Kaser was a supervisor within the meaning of Section 2(11) of the Act.

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, examine, and cross-examine witnesses, to argue orally, and to file posthearing briefs.

On the entire record, including helpful briefs from the General Counsel and Respondent,¹ and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a State of Michigan corporation with an office and place of business in Prentice, Wisconsin, where it is engaged in the operation of a sawmill. Respondent during the 12 months preceding the issuance of the complaint herein, a representative period, in the course and conduct of its business operations, purchased and received at its Prentice, Wisconsin facility goods valued in excess of \$50,000 directly from points outside the State of Wisconsin. There is no dis-

pute and I find that Respondent at all material times has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue Narrowed*

As noted supra, the single allegation of wrongdoing remaining in the complaint is the allegation that Respondent discharged Leonard Kaser on August 16, 1991, because of his union activities. Respondent admits the allegation, but alleges that its action was permissible because Kaser was a supervisor within the meaning of Section 2(11) of the Act and therefore not protected by the Act against discharge for his union activities. The parties agreed that the supervisory status of Kaser at relevant times is determinative of the result of the litigation, i.e., if Kaser was a statutory employee, Respondent has violated Section 8(a)(3) and (1) of the Act as alleged in the complaint and, if Kaser was a supervisor within the meaning of Section 2(11) of the Act, the Act was not violated and the complaint should be dismissed.

Given this admirable narrowing of the issues, the sole dispute at the hearing was the supervisory status of Kaser. This issue was closely litigated by the parties.

B. *The Supervisory Status of Leonard Kaser*

1. Respondent's sawmill's general organizational structure

Respondent commenced operations of a new sawmill (the mill or the plant) in Prentice, Wisconsin, in 1990. The sawmill cuts full tree logs into commercial lumber and timber and thereafter kiln dries and surfaces the finished wood products which are shipped to customers in Wisconsin and various States. The operation generates tree bark and sawdust as byproducts which are used to fuel the boilers which in turn generate steam used in the kiln-drying process and in general building heating.

At all material times, Timothy Biewer, the plant manager, has been the senior official of Respondent on site. His administrative assistant at relevant times was Jamie Hurschutz. Timothy Biewer identified various departments within the mill whose department heads reported directly to him: the saw mill section of the plant supervised by Frank Dennee, the dryline department supervised by Victor (Vick) McKitterick, the maintenance department supervised at relevant times by Russ Williamson and the disputed category and supervisor—the boiler department supervised by Lenny Kaiser.

Biewer testified that in the summer of 1991 the mill's employee complement was approximately 45. The sawmill department employed approximately 24 employees, the dryline department approximately 12, the maintenance department 6, and the boiler department 4.

¹ Respondent filed a motion to receive a reply brief and a reply brief on July 23, 1992. The General Counsel filed a response and motion to strike, in part, Respondent's reply brief on August 3, 1992. Respondent's reply brief is not opposed in its entirety by the General Counsel. Rather the General Counsel opposes only a portion which, the General Counsel argues, contains improper argument. Both parties' responses are received into the record and have been considered in reaching the decision herein. I do not find it necessary under all the circumstances to strike any portion of any brief.

² As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

2. Lenny Kaser's employment at the mill

Leonard (Lenny) Kaser, an experienced and licensed boiler operator, initially contacted Respondent in August 1989 concerning employment in the mill then under construction. Kaser was accepted as a boiler operator but his employment was delayed due to construction difficulties. In February 1991,³ Kaser started employment at the mill. Because the boiler had not as yet been "fired up," Kaser was initially on the sawmill startup crew "working the bugs out" of the new equipment. In early May Kaser spent his time familiarizing himself with the boiler equipment and related manuals and systems. The boiler began operation in mid-May and Kaser spent this period working with the boiler manufacturer's on site field representative who was present for the boiler's startup and break-in process.

Until the day before the boiler was fired, Kaser was the only boiler operator on staff. That day three other boiler operators were hired without Kaser's participation. Kaser testified that two of the three had no prior boiler operation experience and the remaining employee had "minimal" experience.

Once the new boiler break-in period passed, the four boiler operators worked nonrotating 12-hour shifts totaling 48 hours of work in 1 week and 36 the following week until a fifth boiler operator was hired and initially trained in the spring of 1991. At that time Kaser testified he suggested to Biewer that the other four operators continue the regular schedule gaining experience and he rotate as appropriate over the shifts spending time with the operators and instructing them on boiler operation. Biewer agreed and thereafter Kaser worked varying 10-hour days overlapping boiler operator shifts as he felt was appropriate at any given time. Because the change in his schedule reduced his overtime hours and premium pay, his wage rate was increased to produce the same fortnightly gross pay that he had previously enjoyed working on 12-hour rotating shifts. Kaser continued this self-determined work schedule until his discharge.

3. Kaser's relative remuneration, experience, duties, and responsibilities

Victor McKittrick, the dryline department supervisor, at all times after June 1990 received an hourly wage rate less than that paid Kaser. Sawmill Department Supervisor Frank Dennee was initially paid somewhat less, then somewhat more, then somewhat less than Kaser. The boiler operators received substantially less to somewhat less than Kaser.

There is no doubt that Kaser was at all times the most experienced and able boiler operator. He often wrote instructions and special comments for other operators which were posted so that each operator could see them. Nonroutine tasks were directed and coordinated by him. He both trained other operators and reported on their skill levels to management.

Kaser performed regular shift duties until April when he was freed from regular production shift obligations. Thereafter he varied his hours at his discretion to overlap other operators for the purpose of training, special work requirements, and general adjustments as needed. The change increased his opportunity to exercise his training and review

functions with respect to the boiler operators as well as his ability to address special boiler problems.

Kaser was responsible for and undertook the creation of boiler maintenance and safety procedures and the instruction of the boiler operators with respect to these matters. Both during the original installation process and thereafter he had contact with outside contractors respecting boiler processes and procedures.

4. Documentary evidence respecting Kaser's 2(11) status

Respondent's mill seems to have been singularly devoid of paper recordation of employee job classifications. No job descriptions apparently existed respecting the various positions. Many of the documents prepared by Kaser respecting training and procedure which boiler employees were required to sign noted he was "supervisor." As noted *infra*, Kaser's "write up" of Polacek titled Kaser as Polacek's "supervisor." Other forms prepared by Kaser respecting safety and maintenance procedures set forth Kaser's "occupation/job title" as "Boiler foreman." Kaser's August 1990 employee performance evaluation was prepared and signed by Russell Williamson as Kaser's supervisor.

5. Testimony relevant to Kaser's supervisor status

a. General testimony respecting Kaser's supervisory authority

Kaser testified that he was never told that he was the boiler room supervisor or that he had supervisory responsibilities. He testified he acted as a lead employee in the boiler department answering to Maintenance Supervisor Russ Williamson and in some cases to Plant Manager Timothy Biewer. He generally characterized his relationship to employees as non-supervisory involving training and technical assistance. Kaser testified that boiler employee workday scheduling was virtually automatic, operators tried to fill in for one another for special occasions and employees contacted the office for sick calls. He asserted he generally passed employee requests or complaints on to his supervisors and, when he made recommendations respecting boiler operator wage increases or discipline, his recommendations were not regularly carried out.

Boiler operator Aaron Bishop testified he worked with Kaser and did not regard him as his supervisor. Rather Bishop considered Russell Williamson and Timothy Biewer to have been his supervisors. Bishop generally corroborated the essentially automatic operation of boiler department scheduling. Bishop testified that when he asked Kaser for a wage increase, Kaser told him he agreed that Bishop should receive an increase and would discuss it with Biewer. Thereafter Kaser reported to Bishop that Biewer had "no problem with that." Bishop testified that he never received the raise.

Former boiler operator, now procurement forester, Thad Henderson, testified that he regularly took problems in his boiler operator work to Kaser and regarded him as the person in charge. He took a complaint to Kaser that he was not earning enough money. Kaser told him he would raise the issue with Biewer. As a result, Henderson received an increase in hours of work. Former boiler operator Glenn Polacek testified that Kaser told him that neither Biewer nor Williamson knew anything about the boiler operations and

³ All dates refer to 1991 unless otherwise indicated.

“so as far as the boiler is concerned, [Kaser] ran the show.” Indeed Polacek testified he resigned primarily because Kaser was too dominant and critical of Polacek’s work: “You couldn’t do nothing good enough for him. He’d never listen to your point of view on anything.”

Timothy Biewer testified that Leonard Kaser was the supervisor in charge of the four operators in the boiler department although Biewer had never formally created that classification nor explicitly told Kaser that he held specific supervisory duties and responsibilities. Biewer testified that Kaser was responsible for making recommendations regarding hiring, wage increases, and discipline regarding the boiler department. He further testified that Kaser regularly gave his opinion regarding employees’ needs and problems including recommendations respecting wages and discipline. Biewer suggested that on occasions those recommendations were relied on. Kaser was also generally in charge of boiler operations including employee training, safety procedures, and related matters.

b. Kaser’s role in hiring

Kaser testified he suggested various individuals to Biewer for consideration as boiler operators on a general referral basis, but did not participate in their interviews or in their evaluation and hire process. Biewer recalled that Kaser’s recommendations were significantly more specific and qualitative than Kaser’s testimony suggested and asserted that he relied on Kaser’s recommendations in hiring certain employees.

Kaser’s role in the hire of boiler operator Aaron Bishop in December 1990 was disputed. Bishop was initially screened by Respondent’s Administrative Assistant Jamie Harschutz and an initial interview was conducted by her. Harschutz testified Bishop’s second interview was held on a later occasion and was conducted by Biewer and Kaser. She testified that after the interview Kaser took Bishop on a tour of the boiler facilities and thereafter brought Bishop back to the office. She testified that Kaser told Biewer: “I think he’ll work fine.” Thereafter she recalled they discussed both a start date and starting wage rate for Bishop. Biewer corroborated Harschutz’ recollection of the interview process and Kaser’s participation in the hiring process and recommendation that Bishop be hired.

Kaser testified that he reviewed Bishop’s application in the office and spoke to Bishop in Harschutz’ office. Thereafter he showed Bishop around the boiler facilities. He recalled that he did not return to the office with Bishop. Bishop generally corroborates Kaser. Later, Kaser recalled, Biewer asked Kaser his opinion of Bishop and Kaser was “positive” indicating that Bishop would “work out.” Bishop was subsequently hired.

c. Kaser’s role in discipline

Biewer testified that Kaser told him that employee Carlton Loewe was not able to get up and down stairs and that “we needed to do something about it.” Biewer testified that Kaser reported that operator Archie Russel was not adequately recording gauge readings on the boiler reports and sought a meeting respecting this fact. Biewer testified that Kaser recommended the discharge of Glenn Polacek for “letting the boiler go down” and that Biewer responded that

Kaser needed “to first write him up before expelling an employee.” Harschutz generally corroborated Biewer respecting Kaser’s recommendations.

Kaser prepared and issued a written warning to Polacek about that incident dated November 13, 1990. The form was filled out in a manner indicating that Kaser was Polacek’s supervisor. The written warning was placed in Polacek’s personnel file. Polacek testified that Kaser gave him the warning and told him: “If I couldn’t do the job, he’d find someone that would.” Biewer testified that after Polacek was written up Kaser and Polacek met and discussed the problem. In that meeting Biewer recalled Kaser told Polacek that, if the boiler lost pressure again, it would be “the end of his job.”

Kaser testified to numerous occasions when he reported to Biewer on the skills, improvement, problems, and inadequacies of boiler operators. He testified that he had had several problems with Polacek’s work performance prior to the events in question. Kaser testified he had talked to both Russell Williamson and Tim Biewer about Polacek telling them he did not feel that he would make a good boiler operator and that Polacek was not “cut out for the work.” He specifically recalled telling Biewer that Polacek should be fired, but that no action had been taken. Kaser recalled Williamson told him to assign Polacek “out of the ordinary” tasks and, if Polacek did not do them, to “write him up for that.” Kaser also recalled that when he related the boiler pressure failure events to Biewer, Biewer told him to write up Polacek. In response Kaser did so and Polacek, Biewer, and Kaser met to discuss the writeup.

d. Kaser’s role in scheduling, authorizing overtime, and recommending wage increases

Kaser testified that on many occasions he recommended to Biewer that boiler operators receive greater than customary wage increases and carried employees’ wishes in this regard to Biewer. The record is not clear respecting the effectiveness of these requests. At least some of these recommendations were not followed.

There is no dispute that Kaser made the necessary determinations respecting what had to be done to the boiler beyond regular operations and maintenance. Kaser testified that the work schedule was fixed, but that boiler operators could arrange to trade days among themselves with the approval of Biewer. He suggested that timesheets were prepared both by himself and by others. Overtime, which was part of the regular recurring schedule, was automatically authorized. Kaser testified that Biewer had to approve extraordinary overtime. Harschutz testified that Kaser approved overtime based on her observation of Kaser’s initials on timesheets.

C. Analysis and Conclusions

1. The supervisory status of Leonard Kaser

a. The arguments of the parties

Counsel for Respondent on brief argue that Kaser possessed and regularly exercised the authority to direct the work of the boiler operators. They argue further that Kaser possessed and exercised disciplinary authority and that he did not do regular unit work, but rather was in charge of the department and its employees. The General Counsel rather characterizes Kaser as the most skilled and experienced em-

ployee in a subdepartment within the maintenance department who functioned as a leadman, boiler expert, and trainer of other boiler employees. The General Counsel argues that Kaser did not independently direct employees nor effectively recommend either discipline or rewards for employees. In learned presentations of case law, each party advances Board and court decisional law that, given the factual arguments made, supports the legal conclusion sought.

b. *Credibility resolutions*

Turning initially to credibility resolutions respecting the conflicting testimony of certain of the witnesses, I do not believe any witness testified falsely to what he or she recalled concerning the relevant events herein. In no case did the demeanor of a particular witness convince me that he or she was not testifying truthfully. Rather I find that the recollections of some witnesses differed simply because of human variation and differing recollections of events. The bulk of the testimony given was not in significant conflict with the testimony of others. Further much of what was in conflict arose from differing shadings or characterizations of inherently ambiguous circumstances or differed only in conclusions respecting Kaser's general supervisory authority.

Even seeming conflicts such as Bishop's and Polacek's views of Kaser as a supervisor in the boiler department may be explained by the differing perceptions of individuals over a course of time with respect to a series of common but not identical circumstances. While not equally susceptible to harmonization, the testimony of Biewer and Kaser respecting Kaser's authority and actions again is explainable by the fact that Respondent did not have bright line distinctions or established classifications which made Kaser's title, status and authority in the organization clear. Each individual simply viewed the various events discussed above differently. For example, Kaser testified he did not have the authority to approve overtime. Harschutz disputed that testimony, but did so based on her assumptions of the meaning of Kaser's notations of the boiler operator's timecards.

Where specific assertions or attributions have been made and not denied, such as Polacek's attributions respecting Kaser's statements to him, they are credited. Where Bishop, Polacek and Henderson—current or former boiler operators—attribute actions or statements to Kaser, even where Kaser directly or indirectly denied such conduct, I credit their testimony over that of Kaser because I believe their recollections are honest and more likely to be accurately recalled. I find that Kaser's denials were more likely to have resulted from a failure of memory.

In reaching my conclusions below, I have found it unnecessary to resolve all conflicting or ambiguous evidence. Thus, for example, I find it unnecessary to determine if Kaser and the boiler operation had an independent reporting relationship to Biewer or whether the reporting obligation was through another supervisor and department. Indeed given the lack of clear designations at relevant times at the mill, it may be better said that the lines of authority were never clearly or unambiguously spelled out and that reporting was inconsistent. Save where explicit findings are made herein, I have not felt it necessary to further resolve the remaining subsidiary issues in dispute.

c. *Conclusions*

For the reasons appearing below, I find that Leonard Kaser at the time of his discharge by Respondent in August 1991 was a supervisor within the meaning of Section 2(11) of the Act. In reaching this conclusion I have put the burden of proof explicitly on Respondent to demonstrate Kaser was not an employee protected by Section 7 of the Act as the General Counsel argued citing *Communications Workers Local 9509*, 303 NLRB 264 (1991).

Clearly the boiler operation was securely in Kaser's capable hands. He was the sole employee truly knowledgeable in boiler operations. He had essentially sole responsibility for the training of boiler operators. He was in charge of making the boiler operations work and he did so issuing regular special instructions to boiler operating staff, preparing maintenance, training, and safety procedures. He has a generally proprietary attitude about the boiler department.

Training and other technical responsibilities and technical knowledge, standing alone, do not sustain a finding of supervisory status under the Act. In the instant case however, the technical evaluation of operators by Kaser and his reporting on employee competence and industry to management was clear and ongoing. These reports, even if not always acted on, were not independently investigated or verified by Respondent and had the effect of directly effecting boiler operator's jobs. The evidence is undisputed that Kaser reported and/or complained to Williamson and Biewer about employees' performance as boiler operators and made recommendations respecting employee discipline which included recommending an employee's discharge.

Further there is no doubt that Williamson and Biewer expected Kaser to issue disciplinary warnings, i.e., "write employees up," where appropriate. Kaser testified that Williamson told him to assign special duties to an employee and thereafter to "write up" the employee if he did not perform satisfactorily. Biewer specifically directed Kaser to "write up" Polacek. This is clear evidence that Williamson and Biewer regarded Kaser as possessing disciplinary powers.

The Polacek written warning events constitute strong supporting evidence of Kaser's authority to discipline employees as well as evidence that employees knew of his authority in this regard. In that case, as described above, Kaser's report of Polacek's job failure was accepted without independent investigation by management. It is not disputed that Kaser sought Polacek's discharge and that Biewer told Kaser he could not fire Polacek, but rather had to first issue him a disciplinary warning. The fact that Kaser's recommendation that Polacek be discharged was not accepted because of Biewer's preference for a progressive disciplinary approach does not diminish the simple proposition that Polacek was disciplined based on Kaser's complaint and recommendation. Further the warning slip itself, signed by Kaser as "supervisor," along with Kaser's statement to Polacek in their meeting with Biewer that another mistake would cost Polacek his job, augments the finding that Kaser had the power to adversely affect Polacek's job. This authority to effectively recommend discipline of employees independently sustains a finding of Kaser's supervisory status at relevant times.

My finding that Kaser was a supervisor within the meaning of the Act is also supported by the evidence of Kaser's substantial independent direction and control over the boiler

department and the boiler operators. There is no dispute that Kaser was in charge of day-to-day affairs in the boiler department. Indeed following the hire of a fifth boiler employee, Kaser was exclusively devoted to training and direction of employees in the department. As Kaser told Polacek, with respect to the boiler department, Kaser “ran the show.” As noted, *supra*, Williamson make it clear to Kaser he expected him to assign boiler operators various tasks. Given all the above, I find that Kaser was a supervisor within the meaning of Section 2(11) of the Act at the time of his discharge.⁴

2. Summary and conclusion

The parties stipulated that Respondent terminated Kaser because of his union activities. I have found that Kaser was a supervisor within the meaning of the Act at the time of his

⁴As each party noted on brief, the authorities set forth in Sec. 2(11) of the Act necessary to find an individual a supervisor are to be read in the disjunctive. Thus, a finding that an individual possesses any one indicium enumerated in Sec. 2(11) is sufficient to sustain a finding of supervisory status under the statute. This being so it is not necessary to make additional findings respecting the other contentions of the parties respecting the actual and apparent authority possessed by Kaser at relevant times and I decline to do so.

discharge. The General Counsel concedes that, if Kaser was a supervisor at the time of his discharge, the complaint lacks merit. Given these findings, I further find and conclude that the General Counsel’s complaint is without sustainable merit. I shall therefore recommend it be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The complaint shall be and it is dismissed.

⁵If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.